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Ontario Human Rights Commission Policy Statement on HIV/AIDS-Related Discrimination

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 **Ontario**
Human Rights Commission



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PLEASE NOTE

These guidelines contain the Commission's interpretation of the Code provisions as they relate to HIV/AIDS-related discrimination. They are subject to interpretation by boards of inquiry and the courts, and should be read in conjunction with the specific provisions of the Code. Any questions regarding this policy or the Code generally should be directed to the staff of the Ontario Human Rights Commission.

POLICY STATEMENT ON HIV/AIDS-RELATED DISCRIMINATION

INTRODUCTION

"A society is judged by how it responds to those in greatest need. A tragedy such as the HIV epidemic brings a society face to face with the core of its established values, and offers an opportunity for the reaffirmation of compassion, justice and dignity."

James D. Watkins, Chair,
Presidential Committee on the Human
Immunodeficiency Virus Epidemic,
Report, June 24, 1988.

In medical terms, AIDS (Acquired Immunodeficiency Syndrome) is known to be caused by a virus called HIV (Human Immunodeficiency Virus). This virus attacks the body's immune system and generally leaves it incapable of defending itself against various life-threatening diseases and infections.

The methods by which HIV can be transmitted are very limited in nature. Most commonly, HIV is known to be spread through sexual activity and through contact with blood and other body fluids. A person may, therefore, become infected with HIV through such means as receiving blood transfusions or by using blood-contaminated needles. It is essential to recognize that the risk of transmitting HIV through blood transfusions has been virtually eliminated since comprehensive routine HIV antibody screening procedures were

implemented in blood banks across Canada and the United States in 1985.

It is not yet known whether every person infected with HIV will invariably contract AIDS. This uncertainty emanates from scientific evidence which indicates that AIDS may take years to develop in persons who have become infected with HIV.

AIDS is much more, however, than merely a medical/scientific phenomenon. It is challenging our fundamental commitment to creating a compassionate society, to pursuing equity and social justice, and to eliminating discrimination in respect of critical social areas such as employment, services and accommodation. As such, our collective response to AIDS raises deep ethical, social, and legal issues that must be clearly articulated, debated and dealt with.

The critical issue is how, as a society, we can effectively control the spread of HIV infection while at the same time protect the fundamental values upon which our liberal democracy is based and eliminate all HIV/AIDS-related discrimination that undermines those values.

The Ontario Human Rights Commission has an important role to play in addressing and resolving this issue.

To this end, the Commission is issuing this statement regarding AIDS-related discrimination in order to clarify the scope of the *Code* protections for persons infected with HIV or with HIV-related illness, including AIDS, and

the role of the Commission in promoting an environment free of wrongful discrimination. The guidelines contained in this statement were derived through a comprehensive process in which the Commission consulted with a wide-ranging number of interest and advocacy groups, employer groups, services providers, and medical community representatives, including hospital administrators.

CODE PROTECTIONS

Since 1985, the Commission has recognized that AIDS, as an illness, falls within the definition of "handicap" set out in the Ontario Human Rights Code. This means that all persons infected with HIV or with HIV-related illness, including those that are asymptomatic, are entitled to the full protection of the guarantees of equal treatment in respect of employment, housing, contracts and the provision of goods, services and facilities, set out in Part I of the *Code*.

In addition, harassment, defined by section 9(f) of the *Code* as "a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome", is prohibited on the basis of "handicap".

The protections in the *Code* also extend to persons who are members of designated groups under the *Code* and who are believed to be at high risk or carriers of HIV. For example, with reference to the erroneous perception of AIDS as a "gay disease", additional protection is provided through the explicit prohibition of discrimination on the ground of "sexual orientation".

Finally, section 11 of the *Code* provides that "a right under Part I is infringed where the discrimination is because of a relationship, association or dealings with a person or persons identified by a prohibited ground of discrimination". For example, a landlord is in breach of Part I of the *Code* when accommodation is refused to an AIDS advocacy organization because of its association with persons identified by their disability. Similarly, section 11 also applies to situations involving the refusal to serve or employ a person because of his/her relationship with a person who has or is suspected of being infected with HIV or having HIV-related disease.

In addition to the specific prohibited grounds for discrimination mentioned above, section 16 of the *Code* sets out a broad duty to accommodate the needs of persons with handicaps, and may be of particular value to persons with HIV or with HIV-related illness. For example, an employer is obliged to accommodate the needs of a person with a disability such as AIDS in order to assist the person in "performing or fulfilling the essential duties or requirements" of the job. This might involve such steps as a redefinition of work duties and temporary work reassignments especially to accommodate health-related absences.

Those responsible for accommodating the needs of persons with handicaps may be relieved of their duty to provide such accommodation only if it can be demonstrated that the accommodation would cause undue hardship. Section 16(1a) provides that three factors will be considered in applying the undue hardship standard: cost, outside sources of funding, if any, and health and safety requirements, if any. One element that cannot be considered in

assessing undue hardship is customer preference or third party preferences. It is well established in human rights case law that third party preferences do not constitute a justification for discriminatory acts that lead to the exclusion rather than the inclusion of persons into society.

The Commission is in the final stages of formulating guidelines for assessing accommodation requirements and the undue hardship standard. The aim is to help the disabled community, persons responsible for accommodation, and the general public to understand and to apply the concepts of accommodation and undue hardship. This is a matter that will be of special relevance to persons with HIV-related illnesses.

The foregoing outline of the *Code* protections against HIV/AIDS-related discrimination and the duty to accommodate is intended to provide particular guidance to those responsible for formulating and implementing infection control policies in employment, health care and other contexts. For example, to be consistent with the *Code*, health protection and promotion policies should be implemented in as unintrusive a manner as possible and avoid arbitrary, discriminatory treatment of persons with HIV-related illness that cannot be clearly justified in light of current medical or scientific knowledge.

In addition, the spirit of the *Code* requires that persons infected with HIV and those with HIV-related illness be given the opportunity to remain an integral member of society and to maintain their social, employment and other relationships. This implies that any assessment of a person's illness must be based on his or her current abilities and on the situation's current risks, rather than on abilities or risks which may

arise in the future. The *Code*'s accommodation requirements are designed to ensure integration and sensitivity to the specific needs of persons with disabilities as they may change over time.

The application of the *Code* provisions necessarily prohibits, in all but the most extraordinary circumstances, such infection control techniques as the isolation or quarantine of persons with HIV-related illness. Current scientific knowledge on the modes of transmission of the HIV virus indicates that such measures are not only unnecessary in preventing the spread of infection but are also inappropriate except in very rare cases. Moreover, the fear of isolation may simply deter persons who have participated in high risk activities from seeking voluntary testing and counselling.

Testing for HIV infection comes within the Commission's Policy on Employment-Related Medical Examinations. This policy, a copy of which is attached, provides general guidance with respect to acceptable requirements for employment-related medical examinations. For example, the policy provides that employers are prohibited from subjecting job applicants to any type of medical examination prior to the offer of employment. Following employment, medical tests designed to identify employees with disabilities may constitute a breach of the *Code* if the disability being tested for is not a reasonable and bona fide concern with regard to the job performed.

In the vast majority of work settings, it is unlikely that testing or other protective measures would be permitted as persons with HIV infection or HIV-related illness pose virtually no risk to those with whom they interact. Several Studies have been completed about the spread of

HIV through "casual" contact such as by family members, boarding school students and teachers, or in the workplace. Persons infected with HIV were cared for, shared household facilities and equipment, worked beside, played beside, kissed and hugged those who did not have HIV antibodies. Even health care workers and teachers who were bitten by a seropositive person revealed no evidence of seroconversion. There are no documented instances of HIV transmission from the serving or preparation of food or beverages and the U.S. Public Health Service guidelines state that workers infected with HIV should not be restricted from using telephones, office equipment, toilets, eating facilities, or water fountains. For non-sexual household contact, of 30,000 cases of AIDS reported to the CDC, none has occurred in family members of patients with AIDS, unless the members have partaken in other recognized risk-related behaviour (*Biggs v. Hudson*, (1988) 9 C.H.R.R. D834 at para 40344 (B.C. Human Rights Council)). However, in the event that the need for special measures is alleged, the Commission will make a determination based on the particular circumstances.

Finally, it is critical to ensure the maximum degree of privacy and confidentiality in respect of the medical information legitimately required for health protection and promotion purposes. This applies in all situations and circumstances whether in respect of hospitals, health clinics, insurance company records, employee's files and so forth. Given the widespread public misunderstandings, misconceptions, and suspicions about the HIV/AIDS and how it is transmitted, it is all too possible that persons with HIV/AIDS will suffer discriminatory treatment when their health status is known and communicated to others, with devastating

consequences including injury to their personal dignity and sense of self-worth. Moreover, unless such concerns for privacy and confidentiality are adequately addressed, this may also deter persons for voluntarily undergoing tests and treatment that will assist in effectively reducing the spread of HIV infection.

THE ROLE OF THE COMMISSION

Consistent with the *Code's* role as a remedial instrument, the Commission has a broad statutory mandate, not only to provide a remedy when discrimination has taken place, but also to prevent it (section 28). In seeking a remedy the Commission may, in addition to monetary compensation, seek remedies such as the following:

- (1) implementation of a formal institutional policy expressing a commitment to the equal treatment of persons that have or have tested positive for HIV infection;
- (2) educational programs for others in the environment;
- (3) other accommodation required by the person with HIV infection.

With specific reference to HIV/AIDS-related discrimination, the Commission's policy is to expedite complaints because of the shortened life expectancy of persons with HIV or HIV-related illnesses. The Commission may also use its authority to initiate complaints to fight HIV/AIDS-related policies or actions that may

be discriminatory when such information comes to the Commission's attention.

Finally, the Commission is taking a wide range of preventive steps against discrimination prohibited by the *Code*. Such action reflects the Commission's mandate to develop and conduct programs of public information and education, to initiate investigations, to examine and review any statute or regulation, and any program or policy made by or under statute, and to make recommendations on any provision, program or policy that in its opinion is inconsistent with the intent of the *Code*.

With particular reference to the preventive role of the Commission, there is no doubt that the most effective way to combat HIV/AIDS-related discrimination is through public education. In this connection, the Commission is actively seeking the cooperation of public and private organizations in promoting greater understanding both of the nature of HIV infection and HIV-related illness and the critical need to respect basic human rights.

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couverte par l'indicateur régional,
composer le numéro 1-800.

Il faut enfin faire en sorte que l'information médicale légitimement requise à des fins de promotion et de protection sanitaire soit soumise à des normes assurant un maximum de discrétion et de confidentialité. Ces normes doivent s'appliquer dans toutes les circonstances, qu'il s'agisse d'hôpitaux ou de dispensaires, de dossiers d'assurance ou de fichier d'employeur, etc. Étant donné les conceptions erronées, les méprises et les soupçons qui entourent les modes de transmission du virus HIV et du SIDA, il n'est malheureusement pas impossible que les personnes affectées aient à souffrir de la discrimination si leur état pathologique est dévoilé. Une telle indiscrétion peut avoir des conséquences on ne peut plus néfastes portant atteinte à leur sentiment d'amour-propre et de leur dignité humaine. Si les normes de confidentialité et de discrétion ne sont pas convenablement respectées, il se peut, de plus, que certaines personnes refusent de se soumettre à un dépistage volontaire et à suivre un traitement, grâce auxquels la propagation du virus pourrait être enrayée.

3. LE RÔLE DE LA COMMISSION

Conformément au rôle du *Code* qui sert d'instrument de redressement des torts, la Commission a pour mandat, non seulement d'apporter des mesures correctives lorsqu'il y a eu discrimination mais également d'empêcher que celle-ci se produise (article 28). En plus des compensations financières, la Commission peut chercher les redressements suivants:

1. mise en oeuvre d'une politique institutionnelle s'engageant à traiter sur un pied d'égalité toute personne, qu'elle soit séropositive ou non;

2. élaboration d'un programme d'éducation destiné à l'entourage;
 3. autres dispositions à prendre pour satisfaire aux besoins des personnes affectées par le virus HIV.
- En raison d'une espérance de vie plus courte pour les personnes touchées par le virus ou par des maladies s'y rattachant, la Commission a pour politique de chercher à hâter les règlements. Forte de son mandat, la Commission peut également entreprendre de combattre les politiques ou mesures relatives au virus HIV ou au SIDA lorsqu'elles sont portées à son attention.
- Enfin la Commission prend d'importantes mesures en vue de prévenir toute pratique discriminatoire interdite par le *Code*. Une telle action reflète le mandat de la Commission qui est de créer et de mettre en oeuvre des programmes d'information et d'éducation du public, d'entreprendre des enquêtes, d'étudier et d'examiner tout statut ou règlement et tout programme ou recommandations quant aux dispositions, aux programmes ou aux politiques qui, de l'opinion de la Commission, est en contradiction avec l'esprit du *Code*.
- En ce qui concerne le rôle préventif assumé par la Commission, la façon la plus efficace de combattre la discrimination relative au HIV ou au SIDA est, sans aucun doute, l'éducation du public. Dans ce contexte, la Commission encourage activement la participation des organismes publics et privés en vue de promouvoir une meilleure compréhension du phénomène de l'infection du virus HIV et de la maladie, ainsi que du besoin impérieux de respecter les droits fondamentaux de la personne.

cas où l'on se refuse à servir ou à employer quelqu'un en raison de son association avec une autre personne qui serait touchée par le HIV ou une affection connexe.

En plus des raisons discriminatoires énumérées plus haut, les modalités de l'article 16 du *Code* indiquent d'une manière générale l'obligation que l'on a de satisfaire aux besoins des personnes handicapées. Cet article peut être utile aux personnes atteintes du virus HIV ou d'une maladie connexe. Un employeur est par exemple dans l'obligation d'apporter son soutien à une personne qui souffre d'un handicap tel que le SIDA afin qu'elle puisse "s'acquitter des obligations ou de satisfaire aux exigences essentielles" de l'emploi. Cela peut entraîner une nouvelle description des tâches à accomplir et un transfert temporaire, en particulier lorsqu'il s'agit d'aller les absences dues à des raisons de santé aux exigences de l'emploi.

Les personnes auxquelles il incombe de tenir compte des besoins d'une personne souffrant d'un handicap ne peuvent être dispensées de leurs obligations que s'il est prouvé qu'elles ne peuvent s'y soumettre qu'en subissant elles-mêmes un préjudice injustifié. Dans l'article 16 (1a), il est stipulé que trois facteurs seront pris en considération lorsqu'il s'agit de déterminer les normes permettant d'évaluer ce qui constitue un préjudice injustifié: le coût, les sources extérieures de financement, s'il en est, et les exigences en matière de santé et de sécurité, le cas échéant. Il y a un facteur qui ne peut entrer en jeu ici: la préférence du client ou les préférences d'un tiers. Dans la jurisprudence sur les droits de la personne, il est clairement stipulé que les préférences d'un tiers ne peuvent entrer en ligne de compte pour justifier des mesures discriminatoires qui cherchent à exclure certaines personnes de la société au lieu de chercher à les y insérer. La Commission est sur le point de compléter les lignes directrices concernant l'évaluation des besoins en matière de logement et ce qui constitue un préjudice injustifié. Cette action a pour objectif de venir en aide à la communauté des handicapés, à ceux qui doivent leur trouver des logements, ainsi qu'au grand public à des fins de sensibilisation. Il s'agit là de problèmes tout à fait pertinents pour les personnes affectées par le virus HIV.

Les mesures visant à éliminer toute discrimination envers les personnes sidéennes ou infectées par le virus HIV, ainsi que l'obligation que l'on a de leur venir en aide, ont été décrites dans les grandes lignes et ont pour but d'orienter les responsables de l'élaboration et la mise en oeuvre des politiques, de l'enrayement des maladies contagieuses dans les domaines de l'emploi, des soins de santé, etc. Pour bien rester dans l'esprit du *Code*, il s'ensuit que la mise en oeuvre des mesures de protection sanitaire et de politique promotionnelle doit se faire le plus discrètement possible. Dans l'état actuel des connaissances médicales et scientifiques toute discrimination ou mesure arbitraire à l'égard d'une personne atteinte d'une maladie reliée au virus HIV est injustifiée. Il est de plus conforme à l'esprit du *Code* de donner, aux personnes infectées par le virus HIV ou par des maladies s'y rattachant, la possibilité de continuer à participer à part entière à la vie de la communauté et de leur permettre de maintenir leurs relations sociales, professionnelles, etc. Cela signifie

que les risques et les capacités d'une personne doivent être examinés dans la situation présente et non dans l'avenir. Les dispositions du *Code* sont libellées de manière à assurer aux personnes handicapées qu'il y aura adaptation à leurs besoins au fur et à mesure que les conditions changent. L'exécution des dispositions du *Code* interdit nécessairement tout recours à l'isolement ou à la mise en quarantaine de personnes affectées par une maladie reliée au virus HIV, sauf dans des cas extrêmement rares. L'état de la recherche scientifique actuelle sur les modes de transmission du virus montre que de telles mesures sont inutiles et inopportunes et ne contribuent aucunement, sauf dans des cas extrêmement rares, à arrêter la propagation de l'infection. La peur de l'isolement peut même dissuader les personnes ayant participé à des activités à haut risque de se faire tester et de demander les conseils d'un spécialiste.

Dans la plupart des emplois, étant donné que les personnes affectées par le virus HIV ou une maladie connexe, ne posent pratiquement aucun danger aux personnes qu'elles côtoient, il est peu probable que les mesures de dépistage ou autres puissent être permises. La transmission du virus HIV par des contacts "superficiels", par exemple entre membres d'une famille, élèves et enseignants d'un pensionnat ou encore entre collègues sur le lieu de travail, a fait l'objet de plusieurs études. Les personnes infectées du virus HIV ont reçu des soins, partagé les installations et l'équipement ménager, ont travaillé et joué avec celles qui n'avaient pas développé d'anticorps au virus et toutes ont échangé des baisers et se sont serrées dans les bras. On n'a noté aucun cas de séroconversion, pas même chez les travailleurs médicaux ni les enseignants qui avaient été mordus par une personne séropositive. Aucun document ne fait état de la transmission du virus HIV dans le cadre de la distribution ou de la préparation d'aliments ou de boissons; par ailleurs, les directives du service de santé publique des États-Unis interdisent de limiter l'accès des travailleurs infectés du virus HIV aux téléphones, à l'équipement de bureau, aux toilettes, aux salles de repas ou aux fontaines d'eau potable. En ce qui a trait aux contacts non sexuels dans les ménages, pas un seul des 30 000 cas de SIDA signalés aux Centres for Disease Control n'est survenu chez les membres de la famille d'un malade atteint du SIDA, sauf cas exceptionnel où ces membres auraient participé à d'autres activités à risque reconnues. (Biggs v. Hudson, (1989) 9 C.H.R.R. D 834 au paragraphe 40344) (Conseil des droits de la personne de Colombie-Britannique.) Toutefois, s'il est affirmé que des mesures spéciales s'imposent, la Commission prend une décision en fonction des circonstances particulières.

COMMISSION ONTARIENNE DES DROITS DE LA PERSONNE

DÉCLARATION DE PRINCIPES EN CE QUI CONCERNE LES MESURES DISCRIMINATOIRES FRAPPANT LES PERSONNES ATTEINTES DU SIDA

1. INTRODUCTION

"Le jugement que l'on porte sur une société dépend de la réaction qu'elle affiche envers les membres qui ont le plus besoin de son aide. L'infection par le virus HIV est une tragédie qui force une société à réexaminer ses valeurs fondamentales et lui donne l'occasion de réaffirmer sa compassion, son sens de la justice et sa dignité."

James D. Watkins, président
Comité présidentiel sur le virus HIV
Rapport du 24 juin 1988

En médecine, on sait que le SIDA (syndrome immuno-déficitaire acquis) est dû à un virus appelé HIV (Human Immunodeficiency Virus). Ce dernier attaque le système immunitaire du corps et le laisse sans défense contre les maladies dangereuses et les infections.

Les modes de transmission du virus HIV sont peu nombreux. C'est généralement par voie sexuelle ou par le contact avec le sang ou d'autres liquides que cette transmission peut se produire. Il est donc possible qu'une personne soit affectée par le virus HIV après avoir reçu une transfusion sanguine ou après avoir utilisé des aiguilles qui ont été préalablement contaminées par le sang d'une personne infectée. Il est essentiel de comprendre que le risque de transmission du virus HIV lors d'une transfusion sanguine est pratiquement nul depuis la mise en place en 1985, dans l'ensemble du Canada et des États-Unis, d'un test minutieux et systématique de dépistage des anticorps sécrétés en réaction au virus.

Au stade actuel de la recherche, il est impossible de préciser si toute personne infectée par le virus sera ou non atteinte du SIDA, mais l'on sait qu'il peut se passer des années avant que le SIDA se déclare chez une personne ayant été touchée par le virus HIV.

Le SIDA n'est pas simplement un phénomène médico-scientifique. C'est un défi lancé à l'engagement fondamental que nous avons pris de vouloir créer une société charitable où l'on s'efforce d'instaurer un système d'égalité et de justice sociale, où l'on cherche à éliminer toute discrimination dans des domaines aussi cruciaux que ceux de l'emploi, des services et du logement. Notre réaction au SIDA en tant que telle pose de profondes questions d'ordre éthique, social et juridique. Il faut que nous les exprimions clairement, que nous les débattions, que nous les traitions.

Comment notre société peut-elle, d'une manière efficace, enrayer la progression du virus HIV? Comment peut-elle veiller au respect des valeurs fondamentales sur lesquelles reposent nos institutions démocratiques et éliminer toute forme de discrimination due à l'apparition du virus HIV et du SIDA, discrimination qui sape ces valeurs mêmes? Ce sont là des questions du plus grand intérêt.

En s'attaquant et en cherchant à lui trouver une réponse, la Commission ontarienne des droits de la personne a un rôle important à jouer.

C'est dans cette optique que se place la présente déclaration qui a trait à la discrimination reliée au phénomène du SIDA. Le but de la Commission est de préciser la portée du *Code* et la protection qu'il offre aux personnes infectées par le HIV ou toute maladie connexe, y compris le SIDA. Son rôle consiste également à contribuer à l'élimination de toute mesure discriminatoire. Les lignes directrices que l'on trouvera ici sont le fruit des consultations approfondies que la Commission a tenues avec de nombreux groupes d'intérêt et de défense, d'employeurs, de pourvoyeurs de services et de représentants de la communauté médicale, y compris les services administratifs des hôpitaux.

2. PROTECTIONS OFFERTES PAR LE CODE

Depuis 1985, la Commission reconnaît que la maladie du SIDA entre dans la catégorie des "handicaps" tels que les définit le *Code des droits de la personne* de l'Ontario. Cela signifie que toute personne infectée par le virus HIV ou toute maladie connexe, y compris les porteurs asymptomatiques, a le droit de revendiquer, comme il est stipulé dans la partie I du *Code*, un traitement égal en matière d'emploi, de logement, de contrats et d'approvisionnement, de services et d'installations.

En outre, l'article 9(f) du *Code* définit le terme "harcèlement" de la façon suivante: "Fait pour une personne de faire des remarques ou des gestes vexatoires lorsqu'elle sait ou devrait raisonnablement savoir que ces remarques ou ces gestes sont importuns." Un tel comportement place la victime dans une situation de handicap et est formellement interdit.

La protection du *Code* couvre les personnes qui appartiennent à des groupes distincts, comme c'est le cas des porteurs du virus HIV ou des personnes à risques. Étant donné que le SIDA, d'une manière fallacieuse, est associé à l'homosexualité, il faut avoir recours à une protection supplémentaire où il sera précisé que l'orientation sexuelle d'une personne ne peut en aucun cas justifier la discrimination.

Enfin, l'article 11 du *Code* stipule ce qui suit: "Constitue une atteinte à un droit reconnu dans la partie I le fait d'exercer une discrimination fondée sur des rapports, une association ou des activités avec une personne ou un groupe de personnes identifiées par un motif illicite de discrimination." À titre d'exemple, un propriétaire qui refuse de louer un logement à un groupe d'action SIDA en raison de son association avec des personnes touchées par la maladie agit à l'encontre de la partie I du *Code*. L'article 11 s'applique également dans les

Les présentes directives contiennent l'interprétation des dispositions du **Code** en ce qui a trait à la discrimination reliée au virus HIV et au SIDA. Elles sont soumises à la propre interprétation des commissions d'enquête et des tribunaux et doivent être lues conjointement avec les dispositions particulières du **Code**. Pour toute question concernant la politique ou le **Code**, en général, prière de s'adresser au personnel de la Commission ontarienne des droits de la personne.

N.B.

Politique sur les droits de la personne en ce qui concerne les mesures discriminatoires frappant les personnes atteintes du SIDA

